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GOOGLE INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ORACLE AMERICA, INC.,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

Case No. 3:10-cv-03561 WHA

**DECLARATION OF ROBERT A. VAN
NEST REGARDING RULE 706 EXPERTS**

1 I, ROBERT A. VAN NEST, declare as follows:

2 1. I am a partner in the law firm of Keker & Van Nest LLP, counsel for defendant
3 Google Inc. (“Google”) in this case. I submit this declaration in response to the Court’s July 5,
4 2011 Order Regarding Rule 706 Experts (“Order”). I make this declaration based on my own
5 personal knowledge. If called as a witness, I could and would testify competently to the matters
6 set forth herein.

7 2. In its Order, the Court notified Google and Oracle America, Inc. (“Oracle”) of its
8 intention to appoint two experts under Federal Rule of Evidence 706, one to testify regarding
9 damages and one to testify “concerning whether or not the claims tried to the jury, if infringed,
10 constitute the basis for demand for Android.” The Court asked the parties to jointly recommend
11 two candidates for each position by July 26, 2011. The Court further permitted the parties to
12 “submit declarations showing cause why such appointments would (or would not) be advisable,
13 and describing the assignments counsel would prefer be given to the experts.”

14 3. First, Google believes that the issues of damages, on the one hand, and the basis
15 of demand for Android, on the other, are closely related. Put another way, whether the asserted
16 intellectual property forms any part of the basis of demand for Android will be one important
17 consideration in any damages analysis. Accordingly, it might be more efficient for both of these
18 assignments to be handled by the same expert. Should the Court appoint a single expert, rather
19 than two experts, Google believes that it would make the most sense to appoint an economist in
20 that role. Economists—and particularly economists who provide litigation consulting—are
21 experienced both in evaluating the basis of demand for a product and in calculating damages, and
22 would bring an appropriate level of methodological rigor to both tasks.

23 3. Second, if the Court does wish to appoint separate experts for damages and for the
24 basis of demand for Android, Google would be comfortable if the Court appointed an economist
25 to serve in both roles. To the extent the parties are able to identify two qualified economists to
26 serve as damages experts, the Court could simply appoint both economists suggested by the
27 parties, and divide the two roles between them.

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1 4. Third, if the Court decides to appoint a technical or industry expert regarding the
2 basis of demand for Android, Google believes that an industry expert would be more helpful to
3 the Court and the jury than a technical expert. An industry expert would have first-hand
4 knowledge of the market for handsets, operating systems, and applications, how those products
5 are marketed to consumers, and the reason why consumers make their practical purchasing
6 decisions. As Google reads the Court's Order and understands the legal standard, those are the
7 critical questions with respect to evaluating the basis of demand. A technical expert, by contrast,
8 might be limited to offering objective data regarding how any patented features in the Android
9 software improved the performance of that software, but may not have a basis for evaluating the
10 extent to which any of those performance improvements actually mattered to consumers, relative
11 to the other features of the software.

12 5. Fourth, Google believes it would be more appropriate if the Court would limit the
13 role of any Court-appointed expert to confidentially advising the Court, rather than testifying
14 before the jury. Both Oracle and Google have retained damages experts and plan to have those
15 experts testify, including about the basis of demand for the Android software. If the jury also
16 hears testimony from a third, neutral expert, that will further complicate the jury's decision on
17 damages, which decision will already be a complex task. Moreover, if the jury is aware that the
18 Court's expert was appointed by the Court and is not a representative of the parties, that expert
19 will have a powerful stamp of Court approval and objectivity that will lend a disproportionate
20 weight to that expert's opinions and testimony. In addition, only three months remain until trial,
21 and it is still unclear which patent claims Oracle plans to rely on at trial. The expert will need a
22 significant amount of time to gather materials from the parties and get up to speed on the facts of
23 the case. Once the expert does get up to speed, there would be a greater need for both Oracle and
24 Google to take comprehensive discovery of that expert if the expert will testify. Accordingly, it
25 would be logistically simpler and impose less pressure on the parties, the Court, and the expert if
26 the Court gave the expert the more streamlined role of a confidential advisor, rather than the
27 more complex role of a testifying witness.

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1 I declare under penalty of perjury that all the foregoing facts are true and correct and that
2 this declaration was executed on July 26, 2011 at San Francisco, California.

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4 /s/ Robert A. Van Nest /s/

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